Supreme Court, U.S.
FILED

No. 97-1889 MAY 19 1998

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AN, BYUNG WHA AND AN, YOUNG-KAE,
Petitioners,

v.

CHUN, DOO-HWAN, ROH, TAE-WOO, CHOE, SAE-CHANG, CHANG, SAE-DONG, HUR, WHAT-PYUNG AND SAM-SOO, CHUNG, KWAN-DAL, YOO, HAK-SUNG, PARK, JUN-BYUNG AND HEE-DO, AND LEE, HAK-BONG

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

EDDIE YOON
Counsel of Record
9315 Gravelly Lake Drive S.W.
Suite 305
Lakewood, Washington 98499
(253) 983-8475

28 pp

QUESTIONS PRESENTED

1. In a claim brought under the Alien Tort Claims Act ("ATCA"), does a court have personal jurisdiction over Respondents when Respondents were under the control of the U.S. military at the time the injury occurred, have since invested money and bought property in the U.S., have lived in the U.S. for at least two years, and are no longer acting as heads of state?

2. Did the Court of Appeals for the Ninth Circuit err when it denied Petitioner's request to order a deposition of Respondents in Korea?

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No.

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CHANG, SAE-DONG, HUR, WHAT-PYUNG AND SAM-SOO,
CHUNG, KWAN-DAL, YOO, HAK-SUNG,
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On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

Byung Wha An and Young-Kae An ("the Ans") petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The March 16, 1998 Opinion and Memorandum of the United States Court of Appeals for the Ninth Circuit ("Appeals Court") in Case No. 96-35971, attached at A-1 and A-2, are not reported. The Ans' Petition for Rehearing/Clarification was denied on March 6, 1998 in an

unpublished Order attached at A-6. The September 5, 1996 Opinion of the United States District Court for the Western District of Washington ("District Court") is not reported, but is attached at A-7.

JURISDICTION

This case was brought in the District Court pursuant to 28 U.S.C. Sections 1331, 1332, and 1350, and appealed under 28 U.S.C. Section 1291. On March 6, 1998, the Appeals Court denied the Ans' Petition for Rehearing/Clarification (*see* App. A-6), thereby terminating review in that court. The March 16, 1998 Opinion of the Appeals Court (*see* App. A-1) was its final judgment. The jurisdiction of this Court is thus invoked under 28 U.S.C. 1254.

STATUTES INVOLVED

28 U.S.C. Sections 1350 (the Alien Tort Claims Act), 1330 (the Foreign Sovereign Immunities Act), 1602-11, and 1608; Federal Rules of Civil Procedure 4 and 26 (28 U.S.C. Appendix).

STATEMENT

This case involves two former Korean presidents, Doo-Hwan Chun and Tae-Woo Roh, and military officers under their control, all of whom were responsible for acts of torture committed during and after the Kwangju Massacre.[1]

On December 12, 1979, Chun and Roh overthrew the commanding general of the Korean army and established Chun as the head of the government. On May 18, 1980, Chun declared martial law and, by a military decree, dissolved the Korean National Assembly. Korean civilians began demonstrating against Chun, most notably in the Kwangju province. To suppress the demonstrations, Chun and Roh moved the Korean army into the province and eventually tortured and killed as many as 2,000 people.

Petitioner Byung Wha An was at this time the Chief of Police for the Kwangju province. He refused to cooperate with the military and

[1] *See* Andrew Higgins, *When the Buck Stops At the Very Top: South Korea Tries Two Presidents*, WORLD PRESS REV., Jan. 20, 1996, at 12 (attached at A-8).

consequently was tortured by Respondents. Byung Wha died in 1988 as a result of his injuries. His son, Young-Kae, brought this suit in 1996.

At the time of the Kwangju Massacre, the Korean army was controlled by the U.S. army.[2] As Korean officers, Respondents all received U.S. military training. They had daily briefings from the U.S. command and were under the direct control of Gen. John Wickham in Seoul. Gen. Wickham has acknowledged that he knew of the Korean troop movements in the Kwangju province in 1980.[3]

In 1996, due to a changing political climate, Chun and Roh were charged with bribery, mutiny, treason, and murder. They were convicted and incarcerated in Korea, but were later released on amnesty.

Although the Respondents have not cooperated with the Ans' discovery requests, the Ans believe that during Chun's and Roh's presidencies, Respondents purchased property and invested millions of dollars in the United States. Several of the Respondents came to the U.S. to study and at least one of the Respondents lived here for two years or more.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD DETERMINE THE SCOPE OF PERSONAL JURISDICTION OVER FORMER HEADS OF STATE FOR PURPOSES OF THE ATCA.

This lawsuit was brought under the Alien Tort Claims Act ("ATCA"), which establishes original district court jurisdiction over "all causes where an alien sues for tort only, committed in violation of the law of nations or a treaty of the United States."[4] Although the ATCA lapsed into disuse for nearly two centuries, it was revived by the Second Circuit in the 1980 decision *Filartiga v. Peña-Irala*,[5] and

[2] *See* Donald N. Clark, *U.S. Shares Guilt in Korean Army's Misdeeds*, TACOMA NEWS TRIBUNE, Sept. 3, 1996, at A-8 (attached at A-11).

[3] *Id.*

[4] 28 U.S.C. Section 1350.

[5] 630 F.2d 876 (2nd Cir. 1980).

several courts have since allowed plaintiffs to bring claims under the ATCA.[6] Although Congress passed the Torture Victim Protection Act in 1992, that act does not supplant the remedy provided by the ATCA[7] and is not applicable here.

This Court has held that claims brought under the ATCA against a *state* are subject to the jurisdictional limitations--both subject matter and personal--of the Foreign Sovereign Immunities Act of 1976 ("FSIA"),[8] which provides sovereign immunity for any "political subdivision of a foreign state or an agency or instrumentality of a foreign state."[9] Such a conclusion is consistent with the plain language and legislative intent of the FSIA.[10]

However, the controversy in this case arises from the Appeals Court's application of the FSIA to a claim against foreign *individuals*.[11] The Appeals Court here presumed that the FSIA's standards for personal jurisdiction were automatically invoked by the Ans' claim. The Appeals Court's confusion over jurisdiction began in *Chuidian v. Philippine National Bank*, where it stated: "[T]here is little practical difference between a suit against a state and a suit against an individual acting in his official capacity."[12] The problem with the *Chuidian* rule is that, if

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[6] Tom Lininger, *Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts*, 7 HARV. HUM. RTS. J. 177, 180-81 (1994). *See, e.g., In re* Estate of Marcos, 978 F.2d 493 (9th Cir. 1992); Siderman v. Arg., 965 F.2d 699 (9th Cir. 1992); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).

[7] Lininger, *supra* note 6, at 181.

[8] Amerada Hess Shipping Corp. v. Argentine Republic, 448 U.S. 428, 443 (1989); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489 (1983).

[9] 28 U.S.C. Sections 1330, 1602-11.

[10] "The House Report on the FSIA discusses the 'agency or instrumentality' language purely in terms of artificial entities and not natural persons." Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from* In re Marcos Human Rights Litigation, 67 ST. JOHN'S L. REV. 491, 504 n.72 (1993).

[11] *See* March 16, 1998 Memorandum of the United States Court of Appeals for the Ninth Circuit in Case No. 96-35971, attached at A-2; Chuidian v. Philippine Nat. Bank, 912 F.2d 1095, 1102 (9th Cir. 1990).

[12] *Chuidian*, 912 F.2d at 1102.

followed to its logical conclusion, it would swallow the ATCA, rendering the ATCA

> a dead letter for all but piracy-type cases. Since Congress failed to address extraterritorial human rights torts specifically in the FSIA, suits against individual officials for foreign acts of torture would suffer the same fate of dismissal on the pleadings as ATCA suits naming foreign states.[13]

Other courts have taken a better approach, holding that the FSIA will not apply when an official's acts fall outside the scope of his or her authority.[14] Since "no state claims a sovereign right to torture its own citizens,"[15] acts of torture are presumed to fall outside the scope of authority. Although this issue was not squarely before the *Filartiga* court, it stated:

> [W]e doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state.[16]

This Court's decision in *Amerada* also lends support to the contention that the FSIA should not apply in cases against foreign individuals:

> The Alien Tort Statute by its terms . . . has the same effect after the passage of the FSIA as before with respect to defendants *other than foreign states*.[17]

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[13] Fitzpatrick, *supra* note 10, at 507-08.

[14] *See, e.g., In re* Estate of Marcos, 978 F.2d 493, 498 (9th Cir. 1992); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996). *See also* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987) (claim brought under ATCA does not automatically invoke the act of state doctrine).

[15] *Cabiri*, 921 F. Supp. at 1198.

[16] *Filartiga*, 630 F.2d at 889.

[17] *Amerada*, 448 U.S. at 438 (emphasis added).

But even if the Appeals Court ruled correctly in *Chuidian*, the Respondents here are no longer in office and should not be granted immunity under the FSIA as official representatives of Korea. *Former* head of state immunity has not been recognized as a barrier to justiciability.[18] In *Estate of Domingo v. Republic of the Philippines*, when the Marcoses claimed that they were protected by head of state immunity even after they had left office, the court stated:

> Since the purpose of head of state immunity is to avoid the disruption of foreign relations, the original reason for immunizing the Marcoses--protecting the relations between the United States and the Marcos' regime--is no longer present. Head of state immunity serves to safeguard the relations among foreign governments and their leaders, not as the Marcoses assert, to protect former heads of state regardless of their lack of official status.[19]

In spite of the Marcos' arguments that not extending head of state immunity would produce a chilling effect on foreign leaders, the court held that the Marcoses were not immune to suit in the United States.[20]

In the present case, Chun and Roh are in exactly the same situation as the Marcoses: While at one point they may have been able to claim immunity under the head of state doctrine, they are no longer in office and there is no longer any reason to protect the relations between the United States and their regimes. Like the Marcoses, Chun and Roh should not be immune to suit in the United States.

If this Court decides that the FSIA does not apply in actions brought under the ATCA against former heads of state, it will still be left with the task of determining the standard for a court's exercise of personal jurisdiction over such parties. *U.S. Securities and Exchange Commission v. Carrillo* states the rule followed by a majority of the circuits in federal question cases against foreign defendants:

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[18] Fitzpatrick, *supra* note 10, at 498; Lininger, *supra* note 6, at 190. *See also* Estate of Domingo v. Republic of Philippines, 694 F. Supp. 782, 786 (W.D. Wash. 1988); Republic of Philippines v. Marcos, 806 F.2d 344, 360 (2nd Cir. 1986).

[19] *Domingo*, 694 F. Supp. at 786.

[20] *Id.*

> When a district court's subject matter jurisdiction is founded upon a federal question, the constitutional limits of the court's personal jurisdiction are fixed, in the first instance, not by the Fourteenth Amendment but by the Due Process Clause of the Fifth Amendment. Inasmuch as the federalism concerns which hover over the jurisdictional equation in a diversity case are absent in a federal question case, *a federal court's power to assert personal jurisdiction is geographically expanded. "In such circumstances, the Constitution requires only that the defendant have the requisite "minimum contacts" with the United States*, rather than with the particular forum state (as would be required in a diversity case).[21]

In *Carrillo*, the plaintiff brought a nondiversity action against an alien defendant.[22] The court there found that

> the applicable forum for minimum contacts purposes to be the United States in cases where, as here, service of process has been effected pursuant to a federal statute authorizing nationwide or worldwide service . . ..[23]

Here, the Ans are bringing a suit that is based both on a federal question and diversity.[24] However, the broad language of the ATCA and the fact that Federal Rule of Civil Procedure 4(f) allows for service upon individuals in a foreign country warrant an extension of the area considered for personal jurisdiction under the ATCA, just as it has been extended in cases involving other federal questions.[25] Thus, a court's

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[21] 115 F.3d 1540, 1543 (11th Cir. 1997) (emphasis added).

[22] *Id.* at 1542-43.

[23] *Id.* at 1543.

[24] *See* 28 U.S.C. Sections 1331 and 1332.

[25] *See, e.g., In re* Application to Enforce Admin. of Subpoenas of S.E.C. v. Knowles, 87 F.3d 413 (10th Cir. 1996) (Securities Exchange Act); United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080 (1st Cir. 1992) (ERISA); Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406 (9th Cir. 1989) (Clayton Act); Lisak v. Mercantile Bancorp, Inc., 843 F.2d 668 (7th Cir. 1987) (RICO).

inquiry should properly be whether, in a suit brought under the ATCA, the respondent has had sufficient minimum contacts with the *United States*.

In the present case, Chun and Roh have admitted to visiting the United States on several occasions. The fact that those visits were for official state business is irrelevant in determining personal jurisdiction because the Respondents are no longer in office. The Ans believe that Chun and Roh have bought property and invested money in the United States. However, Respondents have not cooperated with the Ans' discovery requests, and the Ans will not be able to substantiate those allegations without court-enforced discovery (*see* Part II below). Several of the Respondents came to the U.S. to study during Chun's and Roh's presidencies, and at least one of the Respondents, Wha-Pyung Hur, has lived and worked in the U.S. for at least two years. Such contacts, once proven, will be substantial, continuous, and systematic enough to establish general jurisdiction over the Respondents.[26] This Court should therefore reverse the Appeals Court's decision and remand this case for reconsideration of the issue of personal jurisdiction.

II. THE APPEALS COURT ERRED IN NOT GRANTING PETITIONERS' REQUEST FOR AN ORDER REQUIRING DEPOSITION OF RESPONDENTS.

Under Federal Rule of Civil Procedure 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved . . .." However, this Court has also noted that "there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court."[27] The problem of how to proceed when discovery is needed to establish personal jurisdiction was addressed by the court in *Thompson Trading Ltd. v. Allied Lyons PLC*.[28] There, the plaintiff alleged that the defendants had engaged in conspiracy, but the defendants entered a motion to dismiss for lack of personal jurisdiction. The court did not grant the

[26] *See* Omeluk v. Lansten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995).

[27] Gibbs v. Buck, 307 U.S. 66, 71-72 (1939).

[28] 124 F.R.D. 534 (R.I. 1989).

defendants' motion, but instead accepted the plaintiff's allegations as true in order to ensure a fair resolution of the issue:

> To put the plaintiff to this task prior to discovery would be wrong for several reasons. First, the jurisdictional issue is so intertwined with the merits of the case that meaningful jurisdictional discovery, in this instance, would be equivalent to full-blown pretrial discovery. Conspiracy is an activity which by its very nature is secretive. Therefore, in many cases it is only through discovery that one can root out its existence. Second, any relevant evidence is most likely to be under defendants' control. Therefore, it would be unfair to plaintiff to require proof of forum contacts at this early stage.[29]

Because the issue of jurisdiction must be resolved before a case can proceed to trial, this Court has affirmed sanctions against parties who do not comply with orders requiring discovery on personal jurisdiction.[30]

In their Petition for Rehearing/Clarification, the Ans requested that the Appeals Court order the Respondents to participate in depositions in Korea. The Appeals Court denied the Ans' entire Petition (*see* App. A-6). The Ans are in a difficult position because they cannot proceed with their case unless they can show that the Court has personal jurisdiction over the Respondents, but they cannot present facts that would establish jurisdiction without conducting discovery. Like the plaintiffs in *Thompson*, the Ans have no control over the relevant evidence and have had difficulty in obtaining information from Respondents. Due to the political circumstances surrounding the Kwangju Massacre, detailed information on incidents of torture and murder has been kept secret. The Appeals Court therefore should have granted the Ans' request and ordered depositions of Respondents in Korea, allowing the Ans to gather critical information necessary to establish personal jurisdiction.

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[29] *Id.* at 535-36.

[30] Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 709 (1982) (Court affirmed a Rule 37(b)(2)(A) order which deemed personal jurisdiction over foreign defendants established after they refused to comply with an order compelling discovery on the jurisdiction issue).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

EDDIE YOON
Counsel of Record
9315 Gravelly Lake Drive S.W.
Suite 305
Lakewood, Washington 98499
(253) 983-8475
Attorney for Petitioners

May 1, 1998

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-35971
CT/AG#: CV-96-05007-FDB

BYUNG WHA AN; YOUNG-KAE AN,
Plaintiffs - Appellants,

v.

DOO-HWAN CHUN; TAE-WOO ROH; SAE-CHANG CHOE; SAE-DONG CHANG; WHA-PYUNG HUR; SAM-SOO HUR; KWAN-DAL CHUNG; HAK-SUNG YOO; JUN-BYUNG PARK; HEE-DO PARK; HAK-BONG LEE,
Defendants - Appellees.

APPEAL FROM the United States District Court for the Western District of Washington (Tacoma).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Tacoma) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED as modified.

Filed and entered January 28, 1998

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
March 16, 1998
by: /s/ Juanja Ross
Deputy Clerk

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-35971
D.C. NO. CV-96-05007-FDB
MEMORANDUM*

BYUNG WHA AN AND YOUNG-KAE AN,
Plaintiffs - Appellants,

v.

DOO-HWAN CHUN, TAE-WOO ROH, SAE-CHANG CHOE, SAE-DONG CHANG, WHA-PYUNG HUR, SAM-SOO HUR, KWAN-DAL CHUNG, HAK-SUNG YOO, JUN-BYUNG PARK, HEE-DO PARK, AND HAK-BONG LEE,
Defendants - Appellees.

Appeal from the United States District Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted December 5, 1997
Seattle, Washington

Before: WRIGHT, REAVLEY** and KLEINFELD, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

Young-Kae An brought suit against General Doo-Whan [sic] Chun, General Tae Woo Roh [sic], and several other military leaders (appellees) on behalf of his deceased father, Byung Wha An, the police chief of Kwangju, Korea, alleging that the appellees tortured his father to death. The district court dismissed An's suit on the grounds that the defendants were immune from An's claims[1] because they were sued in their former official capacities and were therefore immune from suit under the Foreign Sovereign Immunities Act (FSIA).[2] We do not reach that question because we dismiss on the ground that the court lacks personal jurisdiction over appellees.

The assassination of President Park Chung-Hee in 1979 and the ensuing declaration of martial law sparked massive public demonstration in the Kwangju province of South Korea. According to An's complaint, in 1980, General Chun and General Roh[3] and other South Korean military leaders asked Chief An to use police force in his province to suppress the people's uprising, in what was later referred to as the Kwangju massacre. Chief An refused and the military subsequently tortured him for not cooperating. An alleges that in 1988, his father died as a result of his injuries from the torture.

With or without subject matter jurisdiction pursuant to the Alien Torts Claims Act,[4] the court must also have personal jurisdiction over the defendants to hear the case.[5] The plaintiff bears the burden of proof to show that the court can exercise personal jurisdiction over the

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[1] An brought claims under the wrongful death statutes, the United Nations Charter, the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948), the United Nations Rights and Duties of Man, U.N. General Assembly Resolution 2625 (XXV) (Oct. 24, 1970), and the Declaration on Protection of All Persons From Being Subjected to Torture, General Assembly Resolution 3425, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975) (*see Filartiga v. Pena-Irala*, 630 F.2d 876, 882 n.11 (2d Cir. 1980)).

[2] 28 U.S.C. §§ 1330, 1602-11 (1993).

[3] General Chun served as President of South Korea from August 1980 to February 1988, and General Roh served as President from February 1988 to February 1993.

[4] 28 U.S.C. § 1350 (1993).

[5] Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation), 978 F.2d 493, 500-01 (9th Cir. 1992).

defendant.[6] "Because the Washington long arm statute reaches as far as the Due Process Clause, all we need analyze is whether the exercise of jurisdiction would comply with due process."[7]

If the defendants' activities in the forum state are "substantial, continuous, and systematic," a federal court can exercise general jurisdiction over them as to any cause of action, even if it arises out of an activity unrelated to defendants' contact with the state.[8] If the defendants' activities are insufficient to confer general jurisdiction upon the court, the court still may have personal jurisdiction over the defendant if there are sufficient "minimum contacts" with the forum.[9] A court may exercise specific jurisdiction if the foreign parties purposefully availed themselves of the privilege of conducting activities in the forum state, the cause of action arises out of the forum-related activity, and the forum's exercise of jurisdiction is reasonable.[10]

Where service is made under § 1608 of the FSIA, the relevant area in delineating contacts is the entire United States, not merely the forum state.[11] Appellees have not engaged in the necessary activity in the United States to confer either general or specific jurisdiction. They do not own property or conduct business anywhere in the United States. Their visits to this country have been almost entirely official visits on behalf of the Korean government, which do not confer general jurisdiction,[12] and were unrelated to the cause of action in this case.

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[6] Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392, 1396 (9th Cir. 1986).

[7] Omeluk v. Lansten Slip & Batbyggeri A/S, 52 F.3d 267, 269 (9th Cir. 1995).

[8] *Id.* at 270.

[9] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); *Omeluk*, 52 F.3d at 270.

[10] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-77 (1985).

[11] Richmark Corp. v. Timber Falling Consultants, Inc., 937 F.2d 1444, 1447 (9th Cir. 1991).

[12] Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 51-52 (2nd Cir. 1991). The only unofficial visit to the United States by any of the appellees appears to have been a one-week vacation in Hawaii by General Roh in 1995.

The judgment is modified to be without prejudice and affirmed.
AFFIRMED AS MODIFIED.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
March 16, 1998
by: /s/ Juanja Ross
Deputy Clerk

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-35971
D.C. No. CV-96-05007-FDB
ORDER

BYUNG WHA AN AND YOUNG-KAE AN,
Plaintiffs - Appellants,

v.

DOO-HWAN CHUN; TAE-WOO ROH; SAE-CHANG CHOE; SAE-DONG CHANG; WHA-PYUNG HUR; SAM-SOO HUR; KWAN-DAL CHUNG; HAK-SUNG YOO; JUN-BYUNG PARK; HEE-DO PARK; AND HAK-BONG LEE,
Defendants - Appellees.

Before: WRIGHT, REAVLEY,* and KLEINFELD, Circuit Judges.

The petition for Rehearing has been considered and is DENIED.

FILED
Mar - 6 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

* Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NUMBER: C96-5007FDB
JUDGMENT IN A CIVIL CASE

AN, BYUNG WHA, et al.,
Plaintiff,

v.

CHUN, DOO-HWANH [sic], et al.,
Defendant.

____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Motions of the defendants are GRANTED. This action is DISMISSED for lack of subject matter jurisdiction.

September 5, 1996
BRUCE RIFKIN, Clerk
/s/ B. Kay McDermott
By B. Kay McDermott, Deputy Clerk

APPENDIX E

Andrew Higgins, *When the Buck Stops at the Very Top: South Korea Tries Two Presidents*, WORLD PRESS REV., Jan. 20, 1996, at 12.

The cobbler lay in a coma for four days, his skull cracked by repeated blows with heavy clubs, his spine stomped by paratrooper boots, his left leg gouged by a bayonet. After he regained consciousness, an anxious bureaucrat from the Kwangju municipal martial-law command stopped by to see how he was doing. The official suggested a deal: Keep quiet, Lee Chong Nam remembers being advised, and he could earn himself a little money. He would also save himself a lot of trouble.

"The government wanted to bury this whole tragedy just as it buried the bodies," says Lee, still so traumatized that he visits three clinics a day for acupuncture, physiotherapy, psychiactric counseling, and a cocktail of Western and herbal medicines. He has not worked since May 18, 1980, the day South Korean soldiers first ran amok on the streets of Kwangju when they moved in to stop student protests.

Today, after 16 years and several false starts, South Korea is trying to confront, explain, and--most importantly and dangerously--assign blame for the Kwangju massacre, a pivotal event around which modern politics in the country revolve. As a result of the inquiries, South Korea's two previous presidents, Chun Doo Hwan and his loyal protégé, Roh Tae Woo, have been charged with mutiny in seizing power 16 years ago. [In March they stood in the dock, bareheaded, wearing white prison uniforms with numbers on their breast, listening to charges that carry the death penalty.--WPR] The two had previously been indicted for pocketing bribes worth hundreds of millions of dollars

Across Asia, leaders justify past and present brutality as an unfortunate but unavoidable precondition for political stability and economic growth. In the decade and a half that followed the bloodshed in Kwangju, South Korea enjoyed an almost uninterrupted economic boom, a model keenly studied and then repeated by China after the Tiananmen Square massacre in June, 1989.

But in Korea, economic statistics are no longer accepted as the only gauge of political legitimacy. "The old regime had a birth defect," says Bae Ho Hahn, president of the Sejong Institute, a think tank in Seoul. "It came to power with blood on its hands. It was born with an irreparable defect of legitimacy. This was an incurable disease."

The investigation into the killings at Kwangju involves as much politics as zeal for the truth. It is controlled by the prosecutor's office, which in turn takes orders from the Blue House, the presidential mansion and source of all real decision-making power. It is far from the independent inquiry demanded by groups of victims, associations for the bereaved, and various other organizations set up since 1980 to judge facts and responsibility. It still marks the first serious attempt in the region to hold military leaders accountable.

Generals ruled South Korea from a coup d'état in 1961, and through a second coup in 1980, but the country's wealth and dynamism planted the seeds of the autocracy's destruction. "Confucian influence is on the decline," says Bae. "Rigid hierarchies and deference to authority are often seen as the two dominant characteristics of Korean Confucianism. These two pillars may not have yet entirely collapsed, but they are crumbling."

The military's explanation that soldiers resorted to force to put down an armed uprising orchestrated by North Korea has been ridiculed for years. But with most of the ruling elite tainted either by association or direct involvement, authorities showed scant interest in delving into what happened, just as the Chinese Communist Party cannot afford any debate on the killings around Tiananmen Square.

It has been an article of faith among student radicals that the U.S. planned, or at least connived in, a bloodbath in which, officially, about 200 people died. Alternative estimates reach up to 10 times that. Less than a year after the massacre, U.S. President Ronald Reagan gave Chun a warm welcome at the White House, but there is no evidence of direct U.S. involvement.

Most in Kwangju seem to savor the humiliation of Chun and Roh, but there is little jubilation. There is also deep suspicion about the motives of President Kim Young Sam, who initially opposed any attempt to open the Kwangju case but changed his mind late last year. The change of heart coincided with signs that he could fall victim to his own anti-corruption campaign.

Instead of offering excuses, Chun has gone on the attack, appealing to the courts for protection. He has challenged President Kim on his own past: "If I am a criminal who brought confusion to society, then is it not reasonable that President Kim take responsibility for having come together with such insurrectionists?"

Suddenly the old assumptions and alliances have been turned upside down. "We want to cut ourselves off from a history that legitimized coups and military dictatorships," says Sohn Hak Kyu, a former dissident and Oxford graduate who sits in Parliament for the ruling New Korea Party and serves as the party's spokesman. "We need a new history. This means not only defining [the Kwangju student protest] as a democratic movement, but also punishing those who suppressed it."

--Andrew Higgins, "The Guardian" (liberal), London, Jan. 20, 1996.

APPENDIX F

Donald N. Clark, *U.S. Shares Guilt in Korean Army's Misdeeds*, TACOMA NEWS TRIBUNE, Sept. 3, 1996, at A-8.

Since most South Koreans want to avoid further trauma, it is unlikely that the death sentence for former President Chun Doo Hwan will ever be carried out. His trial on charges that included mutiny, treason, murder, and grand-scale larceny was a national catharsis. Yet, because the judgment could not possibly have satisfied everyone, the controversies surrounding his illicit rise to power are likely to continue.

The central controversy concerns his use of army troops to crush a democracy movement in the notorious Kwangju massacre of May 1980, killing hundreds of protesters.

For Americans, the Kwangju massacre is not as familiar as the 1989 Tiananmen massacre in Beijing. Tiananmen happened in the heart of China in full view of the world media, while the Kwangju incident happened in a provincial backwater far from international notice. There is another difference. Americans had no responsibility for what the Chinese army did in Tiananmen Square. The same cannot be said for what the Republic of Korea army did in Kwangju in 1980.

Ever since the United States and the Soviet Union divided Korea in 1945 and the U.S. Army occupied South Korea, the military has been the primary player in relations between Washington and Seoul. Even today, the Pentagon remains the U.S. entity most invested in Korean affairs. Because Koreans knew this, they cannot believe that the United States has nothing to do with the Korean military's actions.

The Korean army massacre of civilians in Kwangju in 1980, the most notorious act of political violence in South Korea's history, does have a U.S. connection. American advisers taught the Korean constabulary of the 1940s how to crush communist and other political opposition. After North Korea's army overran this constabulary in 1950, Americans led the defense of South Korea and turned the constabulary in to an army that became a first-class fighting machine.

Soon thereafter, in 1961, the South Korean army overthrew the civilian government and made national security the excuse for limiting many basic freedoms. With the U.S. Army headquartered in Seoul next door to the Korean army headquarters and the Defense Ministry, and with the continual and intimate communication between the two

countries' military establishments, it seemed obvious that the military government after 1961 did nothing without U.S. approval.

Since 1950, the South Korea-U.S. military marriage has had an additional institutional base. The joint defense of South Korea is under the coordinated command of an American four-star general. This commander has "operational control" over all forces in wartime and over front-line forces in peacetime.

Consequently, when Gen. Chun Doo Hwan sent his army's 20th Division to crush the Kwangju uprising, he first had to notify the U.S. commander, Gen. John Wickham, that he was removing the division from Wickham's control. The U.S. side insists that Wickham had no power to prevent this movement. However, Wickham's acknowledgement that he was notified is taken by many South Koreans to have constituted "approval" of Chun's use of massive military force against the demonstrators in Kwangju.

Military repression was far from the last resort at the time: Negotiations were in progress and the situation was cooling down. However, American toleration of Chun's use of units from the joint command to crush the uprising, though technically legal, forever associated the United States with the Kwangju massacre.

Through the Reagan years, the U.S. government maintained that the episode was an internal matter in which the United States played no role and for which it bore no responsibility.

In 1989, the Bush administration published a white paper that argued the technical innocence of the United States. However, in early 1996, documents came to light that showed that this was not the whole truth. U.S. officials clearly had encouraged Chun to believe that Washington was so worried about instability in South Korea that it preferred continued military rule to the uncertainties of the democratic process.

To be fair, it is unlikely that the Americans had any idea how far Chun was prepared to go to make himself the new Korean strongman. That is the distortion in South Korea today: that Americans somehow willed the Chun regime into power. However, the lines of opinion are far from set in stone.

Today, the joint command is still in place and a U.S. general commands parts of a foreign army that he cannot possibly control. As long as that situation continues, the problem of American complicity in the behavior of the South Korean military will remain. Chun Doo Hwan may go down as just another faraway dictator who finally got

his due. But his crimes were committed in our presence, and we should not be too comfortable with his sentence.

Donald N. Clark is a history professor at Trinity University in San Antonio, Texas. This article was written for the Los Angeles Times.